STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	)	
	)	CASE 17315-E-03-2817
CLARK COUNTY HEALTH PROFESSIONALS	)	
	)	DECISION 8347 - PECB
Involving certain employees of:	)	
	)	
CLARK COUNTY	)	ORDER OF DISMISSAL
	)	
	)	

Martin McGinn, for Clark County Health Professionals.

Dennis M. Hunter, Senior Deputy Prosecuting Attorney, for the employer.

Noel McMurtray, Attorney at Law, for the incumbent union, Laborers' Local 335.

On March 11, 2003, Clark County Health Professionals (CCHP) filed a petition under Chapter 391-25 WAC for investigation of a question concerning representation of certain employees of Clark County (employer) with the Public Employment Relations Commission. Labors' Local 335 (Local 335) was granted intervention as the incumbent union representing the employees involved. The CCHP filed an amended petition on April 11, 2003. On May 5, 2003, by telephonic conference call, Representation Coordinator Sally Iverson conducted an investigation conference. At that time, in pertinent part, the parties agreed that the Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW. Four matters remained in dispute: (1) whether CCHP is a qualified labor organization, (2) whether the petition was timely and whether a contract bar exists, (3) whether the petitioned-for unit is appropriate, and (4) who are eligible employees for the proposed unit. A hearing was held on June 13, 2003, in Vancouver, Washington, before Hearing Officer David Gedrose.

The parties submitted post-hearing briefs. Both the employer and Local 335 later filed motions to strike certain portions of CCHP's post-hearing brief. CCHP's response to those motions included a motion for a new hearing.

Based upon the evidence presented, Commission docket records in this case, the appropriate statutes and administrative codes of the state of Washington, and applicable case law, the Operations Manager rules that the petition was untimely and should be dismissed.

MOTIONS TO STRIKE

The motions are denied. There are no Commission procedures dealing with motion practice, but the Commission generally follows the standard form of rules of superior courts in Washington. The employer and incumbent union ask that portions of CCHP's closing brief be stricken where they assert factual matters not received in the hearing nor contained in Commission docket records, or which assert bias on the part of the Hearing Officer. WAC 391-25-350(b)(3) provides that a hearing officer may allow or direct the filing of briefs as to any or all of the issues in a case. Said briefs may be pre- or post hearing. It is long established Commission practice that at the close of a hearing, the hearing officer asks the parties if they wish to give closing arguments or submit closing briefs. In the majority of cases the parties elect to submit briefs. These briefs are viewed by the hearing officer as the equivalent of a closing argument. The employer accurately states in its motion that the only material which can be considered in this matter is the testimony received at the hearing and the exhibits which were offered and admitted. The closing brief offers a party the opportunity to argue that the

evidence presented supports its theory of the case. Commission hearing officers do not consider the closing briefs as evidence.

A motion to strike portions of a closing argument is more applicable to a jury trial than to an administrative hearing. It is up to the Operations Manager to determine whether a closing brief accurately states the evidence presented and persuasively applies that evidence to the appropriate law or rule. It is also the Operation Manager's responsibility to separate irrelevant assertions with no basis in the record from actual evidence. In the present case, statements or assertions not presented as evidence in the transcript or exhibits will not be considered in forming the Operations Manager's final order.

MOTION FOR A NEW HEARING

The motion is denied. CCHP's response to the motions to strike includes the request for a new hearing, asserting that the motions to strike are an attempt to restrict testimony submitted by CCHP. As noted above, neither CCHP's closing brief nor the briefs submitted by the employer and incumbent union will be considered as evidence in the Operations Manager's ruling. The basis of CCHP's motion for a new hearing is that it was not allowed to completely present its case at the hearing. This motion is premature. WAC 391-25-660 sets forth the appeal process available to all parties once the Operations Manager issues his decision.

BACKGROUND

Clark County is located in the southwestern portion of Washington and comprises one of the larger population centers in the state. Prior to January 1, 2003, the Southwest Washington Health District

(former employer) operated as a distinct government entity and was a public employer. Local 335 was the exclusive bargaining representative for all non-exempt employees of the former employer, and since 1982 these two parties had negotiated nine collective bargaining agreements. As of January 1, 2003, the former employer merged with Clark County and became the employer's health department.

POSITIONS OF THE PARTIES

As to the issues still in dispute, CCHP argues that no contract bar or timeliness issue applies, since, in its view, the contract between the former employer and Local 335 became void after December 31, 2003, and its petition was filed before the employer signed the current collective bargaining agreement. CCHP further asserts it is a legitimate labor organization and that it has proposed an appropriate bargaining unit.

The employer states the petition is untimely and subject to a contract bar, but even if the petition is deemed timely, CCHP has not established the proposed unit is an appropriate bargaining unit.

Local 335 maintains the petition is untimely due to contract, successor, and recognition bars; that CCHP has not proven that the proposed unit is appropriate; and CCHP has not shown that it is a qualified labor organization.

DISCUSSION

The Collective Bargaining Process -

The key to understanding the application of the law to collective bargaining agreements is to acknowledge that they are more than

ordinary contracts, and thus strict contract interpretive principles do not necessarily govern the relationship. *See John Wiley & Sons v. Livingston,* 376 US 543 (1964).

A collective bargaining agreement existed between the former employer and Local 335 for the period of July 1, 2001, through June 30, 2004. In early 2002, the employer and Local 335 began discussions regarding the transition of employees from the former employer to the employer. In October 2002, the employer voluntarily recognized Local 335 as the exclusive bargaining representative for all non-exempt employees of the former employer who were to transfer to the employer. The former employer and employer had agreed on an interagency transfer that stipulated that the employer would honor the job classifications and salary schedules contained in the collective bargaining agreement between the former employer and Local 335, and that the substantive terms and conditions of the contract between the former employer and Local 335 would remain in place pending the adoption of a successor collective bargaining agreement. Local 335 approved this interagency agreement.

The actual merger of the employees of the former employer into the employer's workforce produced no alteration of the wages, hours, or working conditions of bargaining unit members. Employees of the former employer became Clark County employees on January 1, 2003, with the same wages, hours, and working conditions they had on December 31, 2002. The employer and Local 335 negotiated a new collective bargaining agreement, with the effective dates of January 1, 2003, through December 31, 2004. The bargaining unit ratified the agreement on March 10, 2003; the employer ratified the agreement on March 25, 2003.

CCHP alleges that the collective bargaining agreement between the former employer and Local 335 (hereafter, contract 1) expired on

December 31, 2002, and that the collective bargaining agreement between the employer and Local 335 (hereafter, contract 2) did not take effect until March 25, 2003. CCHP thus asserts that no collective bargaining agreement existed between the employer and Local 335 for 83 days. This is inaccurate. The employer and Local 335 continued to adhere to contract 1, which remained in effect until June 30, 2004. The employer in reality became the alter ego of the former employer and assumed the duties regarding contract 1. A chain of liability extends to successor employers where the new employer serves as the alter ego or a "disguised continuance of the old employer." *Kennewick General Hospital,* Decision 4815-A (PECB, 1996). Local 335, through its actions, concurred with the employer's assumption of the former employer's responsibilities. Either party choosing to repudiate the substantive aspects of contract 1 would have done so at its peril. Both parties believed they had a collective bargaining agreement between January 1, 2003, and March 25, 2003, and conducted themselves accordingly. In such situations, the parties are allowed a reasonable period of time to negotiate and ratify successor collective bargaining agreements. The parties were engaged in a normal and mature contracting situation. *Mabton School District,* Decision 2419 (PECB, 1986); *Bellingham Technical College,* Decision 4521 (CCOL, 1993).

The Contract Bar -

RCW 41.56.070 creates a contract bar, restated in the Commission's rules as follows:

> WAC 391-25-030 PETITION--TIME FOR FILING. (1) A "contract bar" exists while a valid collective bargaining agreement is in effect, so that a petition involving any or all of the employees covered by the agreement will be timely only if it is filed during the "window" period not more than ninety nor less than sixty days prior to the stated expiration date of the collective bargaining agreement.
>
> (a) To constitute a valid collective bargaining agreement for purposes of this subsection:

> (i) The agreement must cover a bargaining unit that is appropriate under the terms of the applicable statute;
> (ii) The agreement must be in writing, and signed by the parties' representatives;
> (iii) The agreement must contain a fixed expiration date not less than ninety days after it was signed; and
> (iv) The agreement will only operate as a bar for the first three years after its effective date.
> (b) An agreement to extend or replace a collective bargaining agreement shall not bar a petition filed in the "window" period of the previous agreement.
> (c) A "protected" period is in effect during the sixty days following a "window" period in which no petition is filed, and a successor agreement negotiated by the employer and incumbent exclusive bargaining representative during that period will bar a petition under this chapter. If the filing and withdrawal or dismissal of a petition under this chapter intrudes upon the protected period, the employer and incumbent exclusive bargaining representative shall be given a sixty-day protected period commencing on the date the withdrawal or dismissal is final.

Contract bar provisions are intended to stabilize collective bargaining relationships by providing an orderly procedure for raising questions concerning representation. *Yakima Valley College,* Decision 280 (CCOL, 1977). The contract bar principle does not exist to frustrate attempts to raise representation questions, but allows for such questions to be raised during ascertainable window periods. *Mabton School District,* Decision 2419 (PECB, 1986). In applying contract bar principles to successor agreements, a balance should exist between the employees' right to select their bargaining representative on a predictable basis, and the employer's and incumbent union's expectations of stability in their relationship. *Mabton School District,* Decision 2419; *Bellingham Technical College*, Decision 4521.

Under contract 1, a contract bar existed until the window period for filing a representation petition under that contract, April 2, 2004, through May 1, 2004. Under contract 2, the window period is October 2, 2004, through November 1, 2004. The contract bar may be

overcome if it serves to prevent employees from selecting their bargaining representative on a timely and predictable basis. Exceptions to the contract bar will be found where the employer and incumbent union have produced an agreement that prevents the orderly and predictable filing of representative petitions.

Premature Extensions -

Employers and incumbent unions may not prematurely extend their agreements to overcome a contract bar through allowing incumbent unions to perpetuate themselves against rival unions by renegotiating extensions of agreements prior to a contract's window period. *Mabton School District,* Decision 2419; *Bellingham Technical College,* Decision 4521. The intent of the "premature extension" doctrine is to provide employees with the opportunity to select, reject, or change bargaining representatives at reasonable and predictable intervals, balanced against the need for stability in bargaining relationships. *Mabton School District,* Decision 2419; *Bellingham Technical College,* Decision 4521.

The employer and Local 335 did not prematurely extend an existing collective bargaining agreement and did not extend contract 1 in order to thwart CCHP's representation effort. Rather, the employer and Local 335 developed a healthy bargaining relationship and engaged in good faith negotiations for a successor agreement between Local 335 and a successor employer. Nothing in their efforts prevents CCHP from filing a timely petition in the window period of April-May 2004. In the same way, the terms of contract 2 do not prevent CCHP from filing during that agreement's window period of October-November 2004.

Automatic Renewal Clauses -

The present collective bargaining agreement between the employer and Local 335 (contract 2) contains an automatic renewal clause,

operative in December 2004. RCW 41.56.070 states that agreements containing automatic renewal clauses shall not be valid agreements. The Commission has held that where collective bargaining agreements contain automatic renewal clauses, the legislature did not intend to void the entire contract through RCW 41.56.070, which deals with elections, especially where the parties believe they have a contract and conduct themselves accordingly over an extended period of time. *Seattle School District,* Decision 2079-A (PECB, 1985); *Clark County,* Decision 3451 (PECB, 1990).

As the Commission stated:

> We do not believe that the legislature intended to render collective bargaining agreements such technically fragile instruments, especially in a section of the statute dealing not with substantive contract provisions, as do RCW 41.56.110, 41.56.120, and 41.56.122, but in a section relating to elections [RCW 41.56.070] . . . . It is hardly conducive to stable or harmonious labor relations to tell the parties that everything they have done for the past six months in reliance on a supposed contract is invalid because of a technicality.

Seattle School District, Decision 2079-A.

The automatic renewal clause in contract 2 does not void the entire agreement and destroy the good faith bargaining of the parties for the previous two years. The automatic renewal clause would only come into issue were the employer and Local 335 to assert that it barred CCHP from filing during the October-November 2004 window period. Neither party has made that argument; thus, the automatic renewal clause at bar does not constitute an exception to the contract bar.

In addition, CCHP, as part of the bargaining unit represented by Local 335, benefitted from the agreement by the employer and Local

335 to abide by the substantive terms of contract 1. It continues to benefit from contract 2. CCHP cannot successfully argue to void a contract on the basis of the existence of an automatic renewal clause where it has continued to obtain the benefits of the contract. *Seattle School District,* Decision 2079-A.

Tentative Agreements -

Following National Labor Relations Board (NLRB) precedent, the Commission will not honor oral agreements, but will honor signed informal documents. *City of Port Orchard,* Decision 483 (PECB, 1978). The Commission also has a strong policy favoring communication at the bargaining table, and respect for contractual arrangements. *City of Moses Lake,* Decision 5278 (PECB, 1995).[1] The parties continued good faith negotiations for a successor agreement through January and February 2003 and reached a tentative agreement sometime prior to March 10, 2003. Local 335 ratified the tentative agreement on March 10, and the employer did so in the normal course of its business on March 25. Once Local 335 ratified the agreement, it had a legitimate expectation that the employer would also. In fact, in view of the bargaining history between them, the employer arguably had a duty to sign the contract. *Chelan-Douglas PTBA "Link",* Decision 5136 (PECB, 1995).

Thus, not only were the parties abiding by contract 1 prior to March 25, 2003, but at the time they entered into the tentative agreement they had the intention of maintaining a labor relationship defined by contract 2. CCHP seeks to undo the good faith bargaining between the parties by relying on the technicality that its March 11, 2003, filing occurred prior to the employer's official ratification on March 25 and that a contract bar cannot

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[1] *See* WAC 391-35-020; *Toppenish School District,* Decision 1189-A (PECB, 1981); *Camas School District,* Decision 790 (PECB, 1979).

exist because there was no contract. To give effect to this argument would nullify the import of tentative agreements. Although the parties have the option of individually or mutually declining to ratify tentative agreements, to allow third parties to intervene during the ratification process in order to derail it is contrary to harmonious and stable labor relationships. A union and employer should not have to schedule a contemporaneous ratification in order to prevent an intervener from unraveling the months-long work of the parties in fashioning a contract.

This case presents some peculiar facts. It does not involve an attempt by a union or employer to thwart a timely representation petition by employees by prematurely extending an existing contract. Further, the direction of this case would be different had the employer and Local 335: (1) reached no agreement on the status of the first contract, and (2) had not entered into negotiations for a successor contract, or (3) had not reached an agreement on a successor contract prior to the petition's filing on March 11. The distinguishing marks of this case are the willingness of the employer and Local 335 to reach agreements concerning the terms and conditions of employment of bargaining unit members, and the relatively painless transfer of those members from one employer to another. The Commission will not disturb the fruits of those efforts.

CCHP May Still File Within the Appropriate Window Periods - No prejudice has resulted to CCHP's right to select its bargaining representative in a predictable and timely manner under WAC 391-25-030. Under contract 1 CCHP could have filed in the spring of 2004. It still has that option. In addition, it has the option of filing in the fall of 2004 under contract 2.[2]

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[2] CCHP may file in one of the two window periods, but not both.

CCHP's right to file a representation petition on a timely basis is not only preserved under the facts at bar, but enhanced. Balancing this against the employer's and Local 335's expectation of a stable labor relationship, it would be detrimental to the harmonious labor relationship of Clark County and Local 335 for the Commission to order a premature election and undo the good faith work of the parties begun over one year prior to the final ratification of the new agreement and continuing to the present. Under the facts of this case, a contract bar exists, and the petition was untimely.

Remaining Disputed Issues -
Having found that the petition was untimely, it is unnecessary to analyze and reach conclusions on the issues of: status of CCHP as a labor organization, appropriateness of proposed unit, and eligible employees.

FINDINGS OF FACT

1. Clark County is a public employer within the meaning of RCW 41.56.030(1). Before January 1, 2003, Southwest Washington Health District was also a public employer within the meaning of RCW 41.56.030(1).

2. Laborers' Local 335, a bargaining representative within the meaning of RCW 41.56.030(3), had entered into a collective bargaining agreement with Southwest Washington Health District; the agreement had an expiration date of June 30, 2004.

3. In 2002, the employer agreed to absorb the Southwest Washington Health District into its structure as the Clark County Health Department and became the alter ego of the former employer.

4. The employer voluntarily recognized Local 335 as the exclusive bargaining representative of all non-exempt employees of the former employer.

5. The employer and Local 335 agreed to abide by the substantive terms and conditions of the collective bargaining agreement between Local 335 and the former employer until the parties could negotiate a new agreement.

6. A new agreement was ratified on March 25, 2003, with the effective dates of January 1, 2003, through December 31, 2004.

7. Between January 1, 2003, and March 25, 2003, the parties believed they had a valid labor agreement and acted accordingly and in good faith. The parties believed that their agreement reflected the terms and conditions of the agreement between Local 335 and the former employer.

8. The parties did not honor this agreement for the purposes of frustrating representation petitions, but did so in order to allow time to negotiate a successor agreement between Local 335 and a new employer.

9. Clark County Health Professionals filed a representation petition with the Commission on March 11, 2003, and filed an amended petition on April 11, 2003, seeking to be recognized as the bargaining representative for certain employees within the health department.

10. The window period for filing representation petitions under the former contract between Local 335 and former employer is from April 2, 2004, through May 1, 2004. The window period for filing representation petitions under the current contract

between Local 335 and the employer is from October 2, 2004, through November 1, 2004. CCHP may file a new petition during one of those two periods.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.

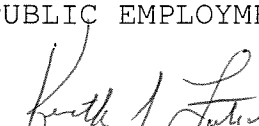
2. On the basis of paragraphs 2 through 10 of the foregoing findings of fact, CCHP was barred from filing a representation petition until either the period between April 2 and May 1, 2004, or the period between October 2 and November 1, 2004, and thus filed an untimely petition on March 11, 2003, and an untimely amended petition on April 11, 2003.

ORDER

The petition, as amended, is dismissed.

Issued at Olympia, Washington, on the 15th day of January, 2004.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KENNETH J. LATSCH, Operations Manager

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.